

AMENDED IN SENATE MAY 17, 2010

AMENDED IN SENATE MAY 4, 2010

AMENDED IN SENATE APRIL 21, 2010

AMENDED IN SENATE APRIL 5, 2010

SENATE BILL

No. 1244

Introduced by Senator Walters

February 19, 2010

An act to amend Sections 621 and 13009 of, and to add Sections 623 and 928.7 to, the Unemployment Insurance Code, relating to employment taxes, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

SB 1244, as amended, Walters. Employment: taxes and contributions: limited liability company.

Existing law requires employers to withhold tax and make contribution amounts with respect to unemployment insurance, disability insurance, employee training funding, and personal income tax from the wages paid to their employees. Existing law, with specified exceptions, requires that the determination of the employer-employee relationship be made pursuant to common law principles.

Existing law defines "employee" for those purposes to include, among other individuals, any officer of a corporation.

This bill would additionally include any member of a limited liability company that is treated as a corporation for federal income tax purposes within that definition of "employee" for those purposes. However, the bill would specify that definition of "employee" does not include any member of a limited liability company that is treated as a partnership for federal income tax purposes.

Existing law also defines “wages” for those purposes, and exempts from that definition certain remuneration.

This bill would provide that wages include compensation, as defined, paid to a member of a limited liability company ~~who files~~ *filing* a federal income tax return.

By expanding the base of wages subject to unemployment insurance taxes, this bill would deposit additional moneys into the Unemployment Fund, a continuously appropriated fund, and would make an appropriation.

Vote: majority. Appropriation: yes. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 621 of the Unemployment Insurance
2 Code is amended to read:

3 621. “Employee” means all of the following:

4 (a) Any officer of a corporation.

5 (b) Any individual who, under the usual common law rules
6 applicable in determining the employer-employee relationship,
7 has the status of an employee.

8 (c) (1) Any individual, other than an individual who is an
9 employee under subdivision (a) or (b), who performs services for
10 remuneration for any employing unit if the contract of service
11 contemplates that substantially all of those services are to be
12 performed personally by that individual either:

13 (A) As an agent-driver or commission-driver engaged in
14 distributing meat products, vegetable products, fruit products,
15 bakery products, beverages (other than milk), or laundry or
16 drycleaning services, for his or her principal.

17 (B) As a traveling or city salesperson, other than as an
18 agent-driver or commission-driver, engaged upon a full-time basis
19 in the solicitation on behalf of, and the transmission to, his or her
20 principal (except for sideline sales activities on behalf of some
21 other person) of orders from wholesalers, retailers, contractors, or
22 operators of hotels, restaurants, or other similar establishments for
23 merchandise for resale or supplies for use in their business
24 operations.

25 (C) As a home worker performing work, according to
26 specifications furnished by the person for whom the services are

1 performed, on materials or goods furnished by that person that are
2 required to be returned to that person or a person designated by
3 him or her.

4 (2) An individual shall not be included in the term “employee”
5 under the provisions of this subdivision if that individual has a
6 substantial investment in facilities used in connection with the
7 performance of those services, other than in facilities for
8 transportation, or if the services are in the nature of a single
9 transaction not part of a continuing relationship with the employing
10 unit for whom the services are performed.

11 (d) Any individual who is an employee pursuant to Section
12 601.5 or 686.

13 (e) Any individual whose services are in subject employment
14 pursuant to an election for coverage under any provision of Article
15 4 (commencing with Section 701) of this chapter.

16 (f) Any member of a limited liability company that is treated
17 as a corporation for federal income tax purposes.

18 SEC. 2. Section 623 is added to the Unemployment Insurance
19 Code, to read:

20 623. “Employee” does not include any member of a limited
21 liability company that is treated as a partnership for federal income
22 tax purposes.

23 SEC. 3. Section 928.7 is added to the Unemployment Insurance
24 Code, to read:

25 928.7. “Wages” includes compensation, that is deductible under
26 Section ~~162(a)(1)~~ 162 of the Internal Revenue Code, paid to a
27 member of a limited liability company ~~who files~~ filing a federal
28 corporate income tax return.

29 SEC. 4. Section 13009 of the Unemployment Insurance Code
30 is amended to read:

31 13009. “Wages” means all remuneration, other than fees paid
32 to a public official, for services performed by an employee for his
33 or her employer, including all remuneration paid to a nonresident
34 employee for services performed in this state, and the cash value
35 of all remuneration paid in any medium other than cash, except as
36 provided by this section. “Wages” includes tips received by an
37 employee in the course of his or her employment. The wages shall
38 be deemed to be paid at the time a written statement including tips
39 is furnished to the employer pursuant to Section 13055 or, if no
40 statement including those tips is so furnished, at the time received.

1 “Wages” includes compensation, that is deductible under Section
2 162 of the Internal Revenue Code, paid to a member of a limited
3 liability company ~~who files~~ *filing* a federal corporate income tax
4 return.

5 “Wages” shall not include remuneration paid under any of the
6 following conditions:

7 (a) For agricultural labor, as defined in subdivision (g) of Section
8 3121 of the Internal Revenue Code.

9 (b) For domestic service in a private home, local college club,
10 or local chapter of a college fraternity or sorority.

11 (c) For service not in the course of the employer’s trade or
12 business performed in any calendar quarter by an employee, unless
13 the cash remuneration paid for that service is fifty dollars (\$50) or
14 more and the service is performed by an individual who is regularly
15 employed by the employer to perform the service. For purposes
16 of this subdivision, an individual shall be deemed to be regularly
17 employed by an employer during a calendar quarter only if either
18 of the following conditions is met:

19 (1) On each of some 24 days during the quarter, the individual
20 performs for the employer for some portion of the day service not
21 in the course of the employer’s trade or business.

22 (2) The individual was regularly employed, as determined under
23 paragraph (1), by the employer in the performance of the service
24 during the preceding calendar quarter.

25 (d) For services by a citizen or resident of the United States for
26 a foreign government or an international organization.

27 (e) For services performed by a nonresident alien individual as
28 designated by regulations prescribed by the department.

29 (f) For services performed by a duly ordained, commissioned,
30 or licensed minister of a church in the exercise of his or her
31 ministry or by a member of a religious order in the exercise of
32 duties required by the order.

33 (g) (1) For services performed by an individual under the age
34 of 18 years in delivery or distribution of newspapers or shopping
35 news, not including delivery or distribution to any point for
36 subsequent delivery or distribution.

37 (2) For services performed by an individual in, and at the time
38 of, the sale of newspapers or magazines to ultimate consumers,
39 under an arrangement under which the newspapers or magazines
40 are to be sold by him or her at a fixed price, his or her

1 compensation being based on the retention of the excess of the
2 price over the amount at which the newspapers or magazines are
3 charged to him or her whether or not he or she is guaranteed a
4 minimum amount of compensation for the services, or is entitled
5 to be credited with the unsold newspapers or magazines turned
6 back.

7 (h) For services not in the course of the employer's trade or
8 business, to the extent paid in any medium other than cash.

9 (i) To, or on behalf of, an employee or his or her beneficiary
10 under any of the following situations:

11 (1) From or to a trust which is exempt from tax under Section
12 17631 of the Revenue and Taxation Code at the time of payment,
13 unless the payment is made to an employee of the trust as
14 remuneration for services rendered as an employee and not as a
15 beneficiary of the trust.

16 (2) Under or to an annuity plan which, at the time of payment,
17 is a plan qualified pursuant to Chapter 5 (commencing with Section
18 17501) of Part 10 of Division 2 of the Revenue and Taxation Code.

19 (3) Under or to a bond purchase plan which, at the time of
20 payment, is a bond purchase plan qualified pursuant to Chapter 5
21 (commencing with Section 17501) of Part 10 of Division 2 of the
22 Revenue and Taxation Code.

23 (4) For a payment which qualifies for deduction by an employee
24 pursuant to Section 219 of the Internal Revenue Code if, at the
25 time of payment, it is reasonable to believe that the employee will
26 be entitled to a deduction under that section for payment.

27 (5) Under a cafeteria plan (within the meaning of Section 125
28 of the Internal Revenue Code).

29 (j) To a master, officer, or any other seaman who is a member
30 of a crew on a vessel engaged in foreign, coastwise, intercoastal,
31 interstate, or noncontiguous trade.

32 (k) Pursuant to any provision of law other than Section 5(c) or
33 6(l) of the Peace Corps Act, for service performed as a volunteer
34 or volunteer leader within the meaning of that act.

35 (l) In the form of group-term life insurance on the life of an
36 employee.

37 (m) To or on behalf of an employee, and to the extent that, at
38 the time of the payment of remuneration it is reasonable to believe
39 that a corresponding deduction is allowable for moving expenses

1 pursuant to Article 6 (commencing with Section 17201) of Chapter
2 3 of Part 10 of Division 2 of the Revenue and Taxation Code.

3 (n) (1) As tips in any medium other than cash.

4 (2) As cash tips to an employee in any calendar month in the
5 course of his or her employment by an employer, unless the amount
6 of the cash tips is twenty dollars (\$20) or more.

7 (o) For service performed by an individual on a boat engaged
8 in catching fish or other forms of aquatic animal life under an
9 arrangement with the owner or operator of the boat pursuant to
10 which all of the following apply:

11 (1) The individual does not receive any cash remuneration, other
12 than as provided in paragraph (2).

13 (2) The individual receives a share of the boat's (or the boats'
14 in the case of a fishing operation involving more than one boat)
15 catch of fish or other forms of aquatic animal life or a share of the
16 proceeds from the sale of the catch.

17 (3) The amount of the individual's share depends on the amount
18 of the boat's (or the boats' in the case of a fishing operation
19 involving more than one boat) catch of fish or other forms of
20 aquatic animal life.

21 This subdivision shall apply only where the operating crew of
22 the boat (or each boat from which the individual receives a share
23 in the case of a fishing operation involving more than one boat) is
24 normally made up of fewer than 10 individuals.

25 (p) For any medical care reimbursement made to, or for the
26 benefit of, an employee under a self-insured medical reimbursement
27 plan pursuant to Section 105(h)(6) of the Internal Revenue Code.

28 (q) To, or on behalf of, an employee to the extent not includable
29 in gross income pursuant to Section 13006.

30 (r) For services to which Section 633 applies.